IN THE HIGH COURT OF DELHI

Crl.M.C. No.3011/2004

M/s.Collage Culture & Ors. ... Petitioners
! through: Mr.Atul Jain, Adv.

VERSUS

$ Apparel Export Promotion Council & Anr. ... Respondent
^ through : Mr.Kuljeet Rawal, Adv.

% DATE OF DECISION: 11.10.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Petitioners pray that the order dated 21.1.2004 summoning the petitioners to face trial for the alleged offence under Section 138 of the Negotiable Instruments Act 1881 be quashed.

2. It is urged that no actionable cause exists in favour of the complainant to make out the offence under Section 138 of the Negotiable Instruments Act 1881. It is urged that the *sine qua non* for the applicability of Section 138 of the Negotiable

Instruments Act 1881 is the issuance of cheque for a debt which is due towards discharge of a liability. It is urged that a cheque given as a collateral security or as a security for payment of an amount which may become payable at a future date upon the happening or the non-happening of an event i.e. towards a contingency cannot be the foundation of an action under Section 138 of the Negotiable Instruments Act 1881.

3. Admittedly, the complaint which was filed under Section 138 of the Negotiable Instruments Act 1881 pertained to cheques issued by the petitioners on 1.6.2003.

4. The cheques in question were in replacement of earlier cheques issued on 1.6.2002 and had to be replaced on account of the fact that the 6 months' validity period of the cheques had expired.

5. A little elaboration is required as to under what circumstances the cheques were issued.

6. First petitioner is in the business of export of garments. The export of garments was regulated by Apparel Export Promotion Council. It used to allot quotas to intending exporters for exporting garments. The quota was valid for an year.

7. As per the policy, if a firm could not exhaust the

quota within the stipulated time, a penalty used to be imposed.

8. For the year 2003-04, the policy stipulated that the earnest money would have to be deposited in the form of an security when quota was allotted. The security was liable to be forfeited if goods were not exported. In case of partial export, proportionate penalty was levied with reference to the unexhausted quota.

9. Clause 8 of the policy stipulated as under:-

> "8. EARNEST MONEY DEPOSITS (EMD)
>
> Amount of Earnest Money Deposits, can be given in the form of Bank Guarantee, FDR (unilaterally encashable by AEPC), or Demand Draft. Legal Undertaking (LUT) subject to the provision of para "E" below and Post Dated Cheques (PDC) subject to the provisions of para "F" below would also be accepted for extension of entitlements in systems other than FCFS. The release/forfeiture of EMD based on performance will be as per the following procedures in different systems of allotment."

10. As per the policy, it was permissible to seek revalidation of the unutilized quota for the ensuing year and for which, pertaining to the unutilized quota, the earnest money deposit had to be revalidated.

11. Realizing that first petitioner would not be in a position to utilize its quota for the year 2001, on 15.10.2001 it sought extension of time to utilize the quota for the year 2001

i.e. sought extension of time to comply with the policy. Along therewith post dated cheques dated 1.6.2002 were issued in favour of the complainant as earnest money deposits.

12. It may be noted that as per the clause 8 of the policy, earnest money could be deposited by post dated cheques.

13. First petitioner could not fulfill its obligations to utilize the unexpired quota by the extended period and on 23.4.2002 the complainant issued a show-cause notice as to why the earnest money be not forfeited and cheques encashed. Letter dated 23.4.2002 reads as under:-

> "TO
> COLLAGE CULTURE
> 56-58 COMMUNITY CENTRE,
> EAST OF KAILASH,
> NEW DELHI-110 065.
>
> SUB : SHOW CAUSE NOTICE
>
> DEAR SIRS,
>
> AS PER YOUR REQUEST, AEPC HAS GRANTED REVALIDATION OF VARIOUS ENTITLEMENT CERTIFICATES DURING THE YEAR 2001. THE DETAILS OF EMD PROVIDED HEREWITH

S.NO.	CHEQUE NO.	DATE	PDC AMOUNT
1.	210469	01-JUNE-2002	29200.00
2.	210472	01-JUNE-2002	277980.00
3.	210473	01-JUNE-2002	540000.00
4.	210474	01-JUNE-2002	417980.00
5.	210475	01-JUNE-2002	400000.00
6.	210476	01-JUNE-2002	517980.00
7.	210477	01-JUNE-2002	186060.00

IT IS OBSERVED THAT YOU HAVE NOT COMPLIED WITH THE TERMS AND CONDITIONS OF THE ALLOTMENT AS PER THE ALLOTMENT POLICY, IN RESPECT OF THE ENTITLEMENT CERTIFICATES AS PER DETAILS GIVEN IN THE ENCLOSED SHEET.

AS PER CONDITIONS OF REVALIDATION, YOUR EMD IS LIABLE TO BE FORFEITED FOR AN AMOUNT OF RS.2369200.00 (RUPEES TWENTY THREE LAC SIXTY NINE THOUSAND TWO HUNDRED ONLY).

YOU ARE HEREBY CALLED UPON TO SHOW CAUSE AS TO WHY YOUR EMD SHOULD NOT BE FORFEITED FOR THE AMOUNT AS INDICATED ABOVE FOR THE REASONS MENTIONED IN THE ENCLOSED SHEET. YOUR REPLY SHOULD REACH THE UNDER SIGNED WITHIN A PERIOD OF 15 DAYS FROM THE DATE OF THIS SHOW CAUSE NOTICE, FAILING WHICH IT WILL BE PRESUMED THAT YOU HAVE NOTHING TO REPRESENT AGAINT THE DECISION INDICATED ABOVE IN CASE OF YOUR WISH TO AVAIL THE BENEFIT ON OVERALL PERFORMANCE BASIS. PLEASE ENSURE THAT YOUR REPLY TO THIS NOTICE IS SUPPORTED BY A DETAILED STATEMENT AS PER ANNEXURE-XIII OF POLICY BOOKLET. AN OPPORTUNITY FOR PERSONAL HEARING IS ALSO GIVEN TO YOU AT 4.00 PM ON 9.5.2002 WITH SHRI J.K.ARORA, ADDL. DIRECTOR, AEPC, NEHRU PLACE. YOU ARE REQUESTED TO ATTEND THE PERSONAL HEARING WITH ALL DOCUMENTARY EVIDENCES SUPPORTING YOUR CONTENTION. KINDLY NOTE THAT IF YOU FAIL TO ATTEND THE PERSONAL HEARING OR REPLY TO THIS NOTICE, A FINAL DECISION ON THIS MATTER WILL BE TAKEN WITHOUT FURTHER REFERENCE TO YOU.

THANKING YOU

YOURS FAITHFULLY
MAHESH JHA
JOINT DIRECTOR”

14. First petitioner filed a reply. Finding the reply unsatisfactory, on 3.7.2002, the complainant, Apparel Export Promotion Council forfeited the earnest money deposit i.e. the amounts covered by the cheques.

15. First petitioner filed an appeal before the Textile Commissioner challenging the order dated 3.7.2002. On 29.8.2002 the Textile Commissioner stayed the operation of the order dated 3.7.2002.

16. During the pendency of the appeal, the post dated cheques issued by the first petitioner on 1.6.2002 expired. On 30.11.2002, under directions of the Appellate Authority, first petitioner replaced the cheques towards earnest money deposit by issuing post dated cheques dated 1.6.2003. The appeal was pending when the complainant presented the cheques for encashment. The cheques were dishonoured somewhere in the 3rd week of November 2003 resulting in the complaint being filed.

17. On 21.1.2004, learned Metropolitan Magistrate, taking cognizance of the complaint summoned the petitioners to face trial.

18. It may be noted that in the meanwhile appeal filed by the petitioner before the Textile Commissioner against the order

dated 3.7.2002 was dismissed.

19. It is not in dispute that the cheques which have formed the subject matter of the complaint were post dated cheques. It is also not in dispute that the cheques were towards replacement of the cheques issued on 1.6.2002 which cheques were also post dated cheques. It is also not in dispute that the cheques were issued as earnest money deposit. It is also not in dispute that the earnest money was liable to be forfeited only if the first petitioner failed to exhaust the quota issued by the complainant for export of garments.

20. A post dated cheque may be issued under 2 circumstances. Under circumstance one, it may be issued for a debt in presenti but payable in future. Under second circumstance it may be issued for a debt which may become payable in future upon the occurrence of a contingent event.

21. The difference in the two kinds of post-dated cheques would be that the cheque issued under first circumstance would be for a debt due, only payment being postponed. The latter cheque would be by way of a security.

22. The word 'due' means 'outstanding at the relevant date'. The debt has to be in existence as a crystallized demand akin to a liquidated damages and not a demand which may or

may not come into existence; coming into existence being contingent upon the happening of an event.

23. Section 138 of the Negotiable Instruments Act 1881 reads as under:-

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account.–** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless–
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a

demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.– For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

24. It would be relevant to note that the statute does not refer to the debt being payable, meaning thereby, a post dated cheque for a debt due but payment postponed at a future date would attract Section 138 of the Negotiable Instruments Act 1881. But the cheque issued not for an existing due, but issued by way of a security, would not attract Section 138 of the Negotiable Instruments Act 1881, for it has not been issued for a debt which has come into in existence.

25. Looking to the precedent, I find that in the decision reported as 2006 (6) SCC 39 *M.S.Narayana Menon @Mani vs. State of Kerala & Anr.*, it was observed as under:-

"52. ..... If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge

of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

26. Under the circumstances, the petition must succeed.

27. The summoning order dated 21.1.2004 is quashed.

October 11, 2007 (PRADEEP NANDRAJOG)
dk JUDGE